



Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

July 27, 2007

RE: MB Docket No. 07-51, FCC 07-32

Dear Madame Secretary:

I am writing in connection with the FCC's Notice of Proposed Rule Making (the "NPRM") on the issue of whether exclusive access and service agreements for multi-dwelling unit (MDU) communities should be prohibited or otherwise regulated at the Federal level. We request that this letter be included in the record for FCC 07-32, MB 07-51.

I am the CEO of DirecPath, LLC, a private cable operator ("PCO") with approximately 50,000 revenue generating units. DirecPath provides state-of-the-art satellite video, high-speed internet and voice services to MDU residents, primarily in the Southeastern United States and Texas. Although we are growing rapidly and are among the nation's largest PCOs, we represent a small fraction of the multi-channel video subscribers in our markets. DirecPath competes directly against franchised cable companies and telephone companies such as Verizon and AT&T. In most cases, our company provides MDU residents with the only available alternative to incumbent monopoly providers.

The issue of exclusive contracts is particularly important for PCOs, because that ability to form such exclusive contracts is the single most important asset of a PCO, and is critical to: (a) capital formation in this developing industry; (b) the financial returns of a PCO; and (c) the actual day-to-day operations of a PCO. These points have been addressed in the Comments of IMCC, which DirecPath supports and endorses.

In this letter, I wish to make several points that have not been sufficiently emphasized in the Comments from the various parties, and to refute a regulatory proposal outlined in Verizon's Comments.

1. The lack of MVPD competition in mandatory access jurisdictions confirms the pro-competitive effects of exclusive MDU contracts.

The best empirical evidence of the pro-competitive effects of exclusive MDU contracts is the lack of MVPD competition in states with mandatory access laws. The Commission has emphasized on several occasions that the inability of non-franchised cable operators (such as PCOs) to form exclusive contracts in mandatory access jurisdictions suppresses competition. For example, in a 2003 Order, the FCC remarked:

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Many parties assert that less competition exists in the MDU marketplace in states that have mandatory access statutes, and the evidence we have on record supports these assertions... We continue to believe that mandatory access laws may impede competition in the MDU marketplace and that they tend to preclude alternative (non-cable) MVPDs from executing MDU contracts ... The predictable result is that competitive providers are less likely to take the financial risk of entering, or to secure the necessary financial backing to enter, the MDU marketplace in a mandatory access state.¹

In this statement, the Commission affirms exactly the argument advanced by the PCO industry Comments submitted in this proceeding by our trade association, the Independent Multi-Family Communications Council: Small, non-franchised cable operators are unwilling to “take the financial risk of entering, or to secure the necessary financial backing to enter” any market where they are legally precluded from forming exclusive contracts with MDU owners.

Were the FCC to ban exclusive contracts at the Federal level, “the predictable result” would be to undermine the ability of competitive providers to compete nationwide, suppressing competitive entry to the dismal level now seen in mandatory access states.

Certainly, DirecPath has no interest in operating in any of the approximately nineteen mandatory access states for this reason, and for several others, including the practical difficulties associated with sharing in-building networks with other providers.

Without any single entity having centralized control over the in-building network, the inevitable result of unit-by-unit competition among two or more providers is signal piracy (violating copyrights), vandalism, damage to the system and, in the end, poor service to the customer – results borne out in my own experience operating cable companies in several Latin American countries without the benefit of exclusive access agreements.

Apart from the practical difficulties associated with sharing an in-building infrastructure, our experience confirms that incumbent providers routinely utilize unfair methods to undermine head-to-head competition within a particular MDU building. The incumbent’s deep pockets and superior economies of scope and scale allow it, when faced with intra-building competition, to offer “promotional discounts” – effectively giving the service away – for the time period required to drive out any competition, after which monopoly service and pricing is quickly restored.

Our management has first-hand experience with the unfair tactics utilized by incumbents to subvert unit-by-unit competition within MDU buildings. In the mid-1990s, I managed OpTel, which was then the country’s largest PCO. The franchised cable operator, Century Cable Communications, was able to force its way into a 750-unit

¹ *Telecommunications Services, Inside Wiring Cable Television consumer Protection and Competition Act of 1992, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003), ¶ 37.*

building in California being served by OpTel for a six-month period, until the Ninth Circuit Court of Appeals affirmed our exclusive contractual rights. During that six-month period, Century engaged in a broad array of anti-competitive actions, including sabotaging our network at the lockbox on multiple occasions (cutting off service to OpTel customers) and providing free service to residents for the purpose of driving OpTel out of the building.² OpTel's experience in California is not unusual where PCOs compete with incumbent providers within MDU buildings.

For all of these reasons, DirecPath strongly believes that a ban on exclusive contracts would inevitably result in the dominance of one or at most two providers in MDU buildings across the country, along with the monolithic service offerings, high prices and below-standard customer service which were characteristic of monopoly cable service prior to the advent of competition.

2. Exclusive contracts provide de facto leverage for MDU residents to bargain with and obtain better service offerings from providers.

The argument against exclusive MDU contracts stands or falls with the assumption that property owners actually function as "gatekeepers" rather than as proxies for MDU residents. (By "proxy," I refer to the role of the MDU owner in informally representing MDU residents collectively in negotiating with broadband providers for better services and prices.) But that assumption implies that the national market for MDU rentals and condominium sales is not competitive – a proposition for which there is not a shred of evidence in the record.

On the contrary, from all indications, the MDU rental and sales markets are highly competitive and for that reason, MDU owners must effectively represent their residents in order to succeed. Thus, to the extent that MDU owners (including condominium owners associations) function as resident proxies, the argument against exclusive contracts fails because exclusive contracts provide the primary leverage for residents to negotiate with video providers in the MDU environment.

Throughout all of our markets in the Southeastern and Southwestern United States, DirecPath typically bids for exclusive right-of-entry agreements against multiple competitors, usually the local franchised cable operator, a telephone company such as AT&T, and quite often, another PCO. Sometimes our bid is accepted and sometimes it is not, but there is absolutely no doubt that competition is intense on a building-by-building basis, and the contract is generally awarded to the provider willing to offer some combination of: (a) the most attractive, customized product bundle (including video, high-speed data and often voice services) at the lowest price, together with the strongest ongoing commitments to (b) installing and upgrading a "future-proof" infrastructure to maintain state-of-the-art services to residents, and (c) providing individualized customer service.

² While predatory pricing is illegal, differential pricing is not, and small independent companies generally lack the financial resources to engage in complex antitrust litigation against conglomerate monopolists.

In our experience, and increasingly as time passes, strong service level and “future-proofing” commitments, together with competitively priced, custom-designed service offering, are not secondary features of our negotiations with MDU owners, but rather the essential foundation for any negotiation in the first instance: Owners demand these commitments as the base level for negotiations, because without them, owners are unable to attract and retain residents in their buildings.³ Attached to this letter is a typical sample of competitive standards language which is routinely included in DirecPath right-of-entry agreements.

This fact provides ample proof that MDU owners view advanced communications capabilities as an essential component of their competitive rental/sales strategy. It is in this sense that MDU owners function not as “gatekeepers,” but as proxies for their residents. Likewise, PCOs are only able to provide the exceptional service level commitments that owners demand to the extent they are granted exclusive service rights for a time period sufficient to manage the risk associated with network investment.

For all of these reasons, the ability to make exclusive contracts is an absolutely crucial competitive asset to both MDU owners and competitive broadband providers. But the ultimate beneficiaries are consumers who live in MDU buildings. Without exclusive contracts negotiated by property owners on their behalf, MDU residents would have no leverage whatsoever in negotiating with large incumbent providers for custom-designed, low-priced services and rigorous customer service commitments – the very features that constitute the life blood of the private cable industry.

DirecPath could, in theory, negotiate non-exclusive deals with MDU owners, but would be forced to charge higher rates, and less attractive service level commitments to account for the additional financial risk in recovering its investments. It is the possibility of securing an exclusive agreement that enables DirecPath to offer residents state-of-the-art video and broadband services at lower prices – such as digital cable and HD, custom tailored channel line-ups, VoIP, and community-wide WiFi services – as well as “gold standard” customer service plans, which in turn make DirecPath more attractive to consumers, and allow our company to maintain the high penetration rates needed to justify ongoing network upgrade commitments.

Moreover, even in cases where our company’s bid for an exclusive contract is not ultimately accepted, there is no doubt that the winning bid provides MDU residents with a better package of services than would otherwise be offered, were DirecPath not to have participated in the bidding at all due to the unavailability of an exclusive deal.

³ In our recent experience, MDU owners make it clear from the outset that the most important single factor in being granted exclusive service rights is *not* the payment of “door fees” or a revenue share, but rather the ability to provide “gold standard” customer service and ongoing network upgrade commitments. Because MDU owners demand as a matter of course rigorous competitive standard commitments, we reject *in toto* the proposition that exclusive contracts “reduce incentives to upgrade facilities.”

3. There are sensible, pro-competitive alternatives to the Commission's draconian proposal to ban all exclusive MDU contracts.

All parties to this proceeding agree that exclusive MDU service agreements are not anti-competitive *per se*, but only in particular circumstances – specifically, when the market is not competitive and exclusive agreements are used to consolidate a party's dominant position in the market by foreclosing a significant portion of the market to competitive entry. A blanket ban on exclusive contracts would create the unintended consequence of eliminating an entire class of competitors (namely, PCOs) from the market, while not addressing those that are specifically objectionable from a public policy perspective.

Therefore, if the Commission decides to take some affirmative regulatory action in this proceeding, such action should be limited in scope, according to several distinct criteria.

First, there is a class of exclusive MDU contracts that have no purpose or effect other than to suppress competition – so-called “perpetual” contracts that endure for the life of incumbent cable company's cable franchise. An FCC rule rendering such perpetual contracts unenforceable would not risk any negative effect on the market, because such contracts serve no conceivable legitimate purpose in the market.

Second, to the extent that other exclusive contracts are regulated, such regulation should be limited to incumbent providers that possess market power, defined as the ability to raise prices without losing customers. There is little doubt that franchised cable operators possess market power in this sense, as evidenced by the fact that over the past several years, large MSOs have been able to raise prices above inflation rates without losing market share.

Even AT&T and Verizon, which actively solicited this NPRM, recognize the wisdom of this limited approach; these companies emphasize that the problem is not exclusive MDU contracts as such, but rather their use by incumbent cable MSOs to lock out potential competitors, particularly in areas where the telephone companies are set to deploy fiber optic networks.

Thus, in its Comments, AT&T remarks that “the Commission would be fully justified in limiting such a prohibition to providers with market power – *i.e.*, because the most significant problems with exclusive access arrangements arise when they are used to preserve the cable incumbents' dominant position in the video market ...”⁴

Like AT&T, Verizon recognizes the need for restraint, and urges the Commission to “adopt a narrowly tailored rule ...” in this proceeding, targeting the use of exclusive agreements by incumbent cable companies to forestall competition.⁵ However, having stated the need for a rule tailored to address the specific harm identified, Verizon

⁴ Comments of AT&T Inc. (dated July 2, 2007), p. 15.

⁵ Comments of Verizon on Exclusive Access Contracts (dated July 2, 2007), pp. 6-9, 13-15.

proposes a rule – banning new exclusive agreements, and rendering existing exclusive agreements unenforceable for a five-year period – that is all-inclusive, and would devastate the market for far longer than the five-year period proposed.

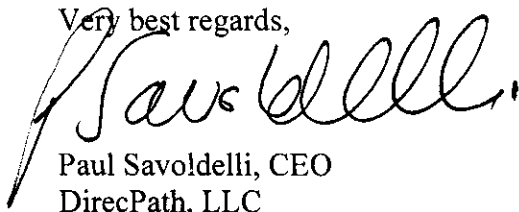
Verizon's proposal is transparently cynical in intent, and if implemented, would be destructive in effect.

Verizon's intent is to use the FCC to pry open a window through which the company crawl into MDU properties, forcing a regulatory reallocation of resources and risks that parties have distributed between and amongst themselves by way of negotiated contractual arrangements. Once inside, Verizon would have five years to utilize the methods described in section 2 of this letter to undercut and drive out the competition, particularly under-cost pricing and promotional "discounts" made possible by virtue of Verizon's economies of scale and deep pockets. Then, five years later, the regulatory window would slam shut, and Verizon, having eliminated the competition, would be free to do exactly what it accuses the cable companies of doing – locking up the market through the use of long-term exclusive access and service agreements.

In summary, as a new and highly competitive entrant into national MDU markets for broadband services, DirecPath, like other PCOs, depends for its economic viability, on its ability to negotiate exclusive video service agreements with MDU owners. More than any other single factor, it is the ability to manage the risks of network investment by means of exclusive video contracts that allows DirecPath to offer and provide a competitive alternative to MDU residents. Without that ability, our company would be unable to secure the financing it requires and would, along with the entire PCO industry, quickly exit the scene, leaving MDU residents to the tender mercies of cable and telephone monoliths and their respective legacies of monopoly service and pricing.

I would be happy to visit FCC's offices in Washington, D.C. to discuss any of the points made in this letter.

Very best regards,

A handwritten signature in black ink, appearing to read "Paul Savoldelli", with a stylized flourish at the end.

Paul Savoldelli, CEO
DirecPath, LLC

Attachment 1

[Typical DirecPath competitive standards commitment]

Video Services.

(a) Minimum Standards. The signal quality, technical standards, number of channels and general operation associated with the Video Services shall conform in all material respects to the applicable specifications of the Federal Communications Commission or subsequent governing bodies or agencies and shall be competitive with video services being provided by other video service operators to comparable multi-unit dwelling units located within the _____ metropolitan area. Owner and Operator intend to create and maintain a competitive position for Owner in its ability to market the Premises to prospective and actual Residents over "Comparable Projects" (defined below). Operator warrants that the quality, technology, features and options (including the number and variety of cable TV channels) of the System and Services and the pricing to the Residents that Operator will provide under this Agreement shall fall within a range reasonably equivalent to prevailing market standards and rates, and that Operator's prices shall never be greater than the highest (standard, non-promotional) retail rates then known to be charged by other providers of reasonably equivalent multi-channel video programming services to multi-dwelling unit properties of comparable size and density in the _____ metropolitan area ("Comparable Projects"). If Operator fails to meet its obligations in this Section 6(a), Owner will notify Operator in writing specifying Owner's specific objections. Operator will have thirty (30) days to respond to Owner with a proposed Remedial Program designed to correct the alleged failures at the Premises and, if approved by Owner, such Remedial Program will be implemented at the Premises within forty-five (45) days from Owner's approval of the proposed Remedial Program. Owner will notify Operator of its approval or disapproval, which approval will not be unreasonably withheld nor delayed, of the proposed Remedial Program within five (5) business days of Operator's submission of it to Owner. If Operator will require more time to implement a Remedial Program (or any component thereof), Owner may, in its sole discretion, extend the time for implementation of the Remedial Program, and Operator will diligently pursue its complete implementation within the extended period. Notwithstanding the preceding sentence, if Operator will require more time to implement a Remedial Program due solely to governmental licensing, Operator shall be entitled to such amount of additional time as is reasonably required to so implement the Remedial Program. If (i) Operator does not respond within the thirty (30) day period, (ii) Operator fails at any time to diligently pursue completion of the Remedial Program within the applicable time period, or (iii) Owner reasonably disapproves of Operator's proposed Remedial Program and a substituted Program which reasonably addresses Owner's specific concerns is not subsequently proposed by Operator within thirty (30) days of the date of such prior disapproval by Owner, then Owner may treat such conduct by Operator as a default hereunder. Operator shall perform all work hereunder in a good and workmanlike manner and in compliance with all applicable federal, state and local laws, ordinance and regulations and to the standards of the private cable television industry.

.....

(f) Future Services and New Services. From time to time during the Term, either Operator or Owner may propose in writing for additional multi-channel video programming and/or related services to be provided by Operator to Residents (collectively, "Future Services"). The terms and conditions of any program for Operator to provide Future Services shall be subject to negotiations between Owner and Operator to determine the nature and extent of the Future Services and the additional Rent to be paid by Operator. Unless and until Owner and Operator have agreed on the nature and extent of the Future Services to be provided, and the amount of additional Rent to be paid by Operator to Owner in connection therewith, Operator shall not provide any Future Services to the Premises. If Owner and Operator agree on the terms of any program by which Operator shall provide any Future Services to Residents, Owner and Operator shall execute a mutually acceptable amendment to this Agreement evidencing the addition of such Future Services to the definition of Services and the additional Rent payable by Operator to Owner in connection therewith. Operator shall provide the Services to the Premises using current competitive technology. Operator shall offer Future Services to Owner as they become commercially available from Operator to other properties.

At any time during the Term of this Agreement, Owner may request that Operator provide the Residents with additional services which (a) are not competitive with the Services provided hereunder by Operator, (b) may be reasonably provided to the Residents by utilization of the Wiring at the Premises without additional wiring or other installation costs to Operator, and (c) utilize a technology which may be economically used at the Premises (collectively, "New Services"). Operator shall have a period of forty-five (45) days to respond in writing to Owner whether Operator is interested in and able to provide the New Services to the Residents at the Premises. In the event Operator desires to provide the New Services, the terms and conditions with respect to the New Services shall be subject to negotiations between the Owner and Operator to determine the nature and extent of the New Services, and the additional compensation to be paid by the parties with respect to such New Services. In the event Operator does not desire to provide the New Services or in the event Owner and Operator do not agree upon the terms upon which such New Services shall be provided, then Owner may provide the New Services to its Residents or contract with a third party to do so; provided the parties reach an agreement concerning the compensation to be paid to Operator for use of the Equipment.